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The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards

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THE *MEAD* DOCTRINE: RULES AND STANDARDS, META-RULES AND META-STANDARDS

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INTRODUCTION

*United States v. Mead Corp.*¹ is the U.S. Supreme Court's most important pronouncement to date about the scope of the *Chevron* doctrine.² According to Justice Scalia's dissenting opinion, *Mead* is "one of the most significant opinions ever rendered by the Court dealing with the judicial review of administrative action."³ Justice Scalia also thought that the consequences of "the *Mead* doctrine," as he called it, "will be enormous, and almost uniformly bad."⁴

Justice Scalia's indictment of *Mead* was driven by his attachment to rules and dislike of standards.⁵ He saw *Mead* as shifting the practice of

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1. 533 U.S. 218 (2001).

2. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

3. *Mead*, 533 U.S. at 261 (Scalia, J., dissenting).

4. *Id.* at 239, 261 (Scalia, J., dissenting).

5. See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L.

deference away from the more rule-like *Chevron* approach toward the more standard-like doctrine associated with *Skidmore v. Swift & Co.*⁶ As he noted sarcastically, "The Court has largely replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."⁷ Justice Scalia urged instead that *Chevron* be declared the sole measure of judicial deference to agency interpretations of statutes, with *Skidmore* relegated to the dustbin of history as an "anachronism."⁸

The majority responded with an air of patient resignation. "Justice Scalia's first priority over the years has been to limit and simplify," Justice Souter observed in his opinion for the Court, whereas others would "tailor deference to variety."⁹ Justice Souter could afford to take a detached attitude toward Justice Scalia's fulminations. In his campaign to award the field to *Chevron* as the sole survivor in a battle against *Skidmore*, Justice Scalia failed to attract a single additional vote.¹⁰

But the choice between rules and standards was present in *Mead* not only at what might be called the primary decisional level—the level where courts decide whether to accept any particular agency's interpretation of a statute. The choice is also implicated at the meta-level where the court must decide which legal doctrine to use (*Chevron* or *Skidmore*) in determining whether to accept the agency interpretation. Assuming—as eight Justices evidently do—that we have two deference doctrines, the more rule-like *Chevron* and the more standard-like *Skidmore*, how do we determine where *Chevron* stops and *Skidmore* starts within the system of judicial review? Do we police this boundary by means of a meta-rule or a meta-standard?

As to this higher-order issue, there was no meaningful debate between Justice Souter and Justice Scalia. Justice Souter began his opinion by announcing what appeared to be a two-part rule: "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron*

REV. 1175 (1989) (commenting on the benefits of a jurisprudence based on rules rather than standards).

6. 323 U.S. 134 (1944).

7. *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

8. *Id.* at 250 (Scalia, J., dissenting).

9. *Id.* at 236.

10. In *Christensen v. Harris County*, 529 U.S. 576 (2000), eight Justices subscribed to the view that *Skidmore* survives as a distinct deference doctrine, with only Justice Scalia dissenting on this point. See *id.* at 589 (Scalia, J., concurring) (declining to apply *Skidmore* deference to a Department of Labor opinion letter); see also *Bragdon v. Abbott*, 524 U.S. 624, 641-42 (1998) (applying both *Chevron* and *Skidmore* deference to different interpretations); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991) (applying *Skidmore* deference over Justice Scalia's concurrence, which urged the use of *Chevron*).

deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."¹¹ By the time Justice Souter had finished his analysis, however, the inquiry had collapsed into a formless consideration of "factors" of unspecified weight. That is to say, the majority ended up with a meta-standard. Justice Scalia, for his part, also started with what appeared to be meta-rule: *Chevron* should apply to any interpretation "by the administering agency that is authoritative—that represents the official position of the agency."¹² But on closer examination this too turned out to be a multifactoral standard, albeit one that Justice Scalia insisted was more "bright-line" than the standard employed by the majority.¹³

I argue in this Article that both the majority, and the dissent, were mistaken in seeking to define the domain of *Chevron* with anything other than a meta-rule. The majority was on the right track in holding that the key to the scope of *Chevron* is whether Congress has delegated authority to an agency to make rules with the force of law, and the agency has exercised that authority. The next logical step was to define what it means for an agency to act with "the force of law." The traditional understanding is that agency action has such an effect when it is not open to further challenge and subjects a person who disobeys to some sanction, disability, or other adverse legal consequence. Final legislative rules, both substantive and procedural, have this effect, as do final, self-executing adjudicatory orders. Other types of agency action do not. A reasonably clear meta-rule was thus within the grasp of the Court. It should have seized it. As we shall see, using a meta-rule to determine the scope of *Chevron* deference has a number of desirable consequences that will be diluted or lost under a meta-standard.

I. IN SEARCH OF THE MEAD DOCTRINE

Chevron, of course, is the Court's most important decision about the most important issue in modern administrative law—the allocation of power between courts and agencies "to say what the law is."¹⁴ *Chevron* describes a now-familiar two step procedure for resolving this issue, asking

11. *Mead*, 533 U.S. at 226-27. See *id.* at 237 (stating *Skidmore*, rather than *Chevron*, applies when "circumstances indicate no intent to delegate general authority to make rules with force of law, or where such authority was not invoked [by the agency].").

12. *Id.* at 257 (Scalia, J., dissenting).

13. *Id.* at 258-59 n.6 (Scalia, J., dissenting).

14. See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2074-75 (1990) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and describing *Chevron* as a "counter-*Marbury*" for the administrative state).

first whether Congress has “directly spoken” to the contested issue of interpretation, and if not, whether the agency’s interpretation is “permissible” or “reasonable.”¹⁵ The inquiry seems rule-like because each step is defined in terms of the examination of a single variable—whether or not Congress has answered the question (step one), and whether or not the agency interpretation is reasonable (step two).¹⁶

As any administrative lawyer can attest, this rule-like appearance is deceptive. Many different considerations can be brought to bear in determining at step one whether a statute is clear or ambiguous; an equally wide-range of variables are implicated in asking at step two whether the agency has adopted an interpretation that is reasonable. Still, as compared to the multi-factoral approach that preceded *Chevron*, and that lives on under the mantle of *Skidmore*, the *Chevron* doctrine narrows significantly the range of factors that courts may consult in deciding whether to accept or reject an agency reading of a statute. In that sense, the *Chevron* doctrine is, if not a rule, at least more rule-like¹⁷ than *Skidmore*,

which set[] forth a sliding scale of deference owed an agency’s interpretation of a statute that is dependent “upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁸

For many years after *Chevron*, it was unclear whether *Chevron* had superseded *Skidmore*, or if not, when courts should apply *Chevron* and when they should turn to *Skidmore*.¹⁹ The Court took its first important step toward resolving these issues just two years ago in *Christensen v. Harris County*.²⁰ The question was whether an agency interpretation advanced in an opinion letter written by an agency official, and later endorsed in an amicus curiae brief filed with the U.S. Supreme Court, is eligible for *Chevron* deference. Five Justices, in an opinion by Justice Thomas, held *Chev-*

15. *Chevron*, 467 U.S. at 842-43.

16. “A rule singles out one or a few facts and makes it or them conclusive of legal liability; a standard permits consideration of all or at least most facts that are relevant to the standard’s rationale.” *Mindgames, Inc. v. W. Publ’g Co.*, 218 F.3d 652, 657 (7th Cir. 2000) (Posner, C.J.).

17. As others have recognized, rules and standards are not a dichotomy but exist along a continuum. See, e.g., Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992) (noting rules and standards fall along a “continuum of discretion”).

18. *Mead*, 533 U.S. at 250 (Scalia, J., dissenting) (quoting *Skidmore*, 323 U.S. at 140).

19. See generally Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO L.J. 833, 848-52 (2001) (cataloguing numerous unresolved questions about when *Chevron* applies).

20. 529 U.S. 576 (2000).

ron does not apply in these circumstances.²¹ The majority stated that agency interpretations are eligible for *Chevron* deference only if they have been advanced in a decisional format that has the "force of law," and an opinion letter, whether or not endorsed in an agency amicus brief, does not have the force of law.²² The Court made no attempt to explicate what it means for agency action to have the force of law, or how the force of law criterion links up with the underlying rationale of *Chevron*.

Christensen elicited two dissents with respect to the scope of *Chevron*. Justice Scalia argued that the agency opinion letter was entitled to *Chevron* deference, because it reflected the "authoritative" view of the agency.²³ Justice Breyer, joined in relevant part by Justices Stevens and Ginsburg, opined that the majority had overstated the distinction between *Chevron* and *Skidmore*, and suggested that *Chevron* simply identified "an additional, separate legal reason for deferring to certain agency determinations."²⁴

Sensing further clarification was needed, the Court immediately granted the government's petition for certiorari in *United States v. Mead Corp.*,²⁵ which presented the question whether tariff classification rulings issued by the Customs Service are entitled to *Chevron* deference. When a ruling finally emerged in *Mead*, it revealed a new alignment. Eight Justices, including the five who had joined the Thomas opinion in *Christensen*,²⁶ plus the three who joined the Breyer dissent,²⁷ united behind an opinion by Justice Souter holding that tariff classification rulings are not entitled to *Chevron* deference.²⁸ This time, only Justice Scalia dissented, again asserting his view that any "authoritative" interpretation should be eligible for *Chevron* deference.²⁹

Tariff classification rulings are letter rulings issued by the Customs Service in response to a request by an importer for advice as to what tariff applies to a proposed importation of foreign goods. Such rulings are expressly authorized by statute, which speaks of them as "binding" rulings,³⁰ and the implementing regulations state that they are "binding on all Cus-

21. See *id.* at 577 (noting Justices Thomas, Rehnquist, O'Connor, Kennedy, and Souter were in the majority).

22. *Id.* at 587.

23. *Id.* at 589 (Scalia, J., concurring).

24. *Id.* at 596 (Breyer, J., dissenting).

25. 185 F.3d 1304 (Fed. Cir. 1999), *cert. granted*, 530 U.S. 1202 (2000).

26. See *supra* note 21 and accompanying text (naming the five Justices in the *Christensen* majority opinion).

27. See *supra* text accompanying note 24.

28. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

29. *Id.* at 241 (Scalia, J., dissenting).

30. 19 U.S.C. § 1502(a) (1994).

toms Service personnel" until "modified or revoked."³¹ However, this binding effect is limited to the specific import transaction described, and other importers are cautioned not to rely upon the rulings "in connection with any transaction other than the one described in the letter."³² In the typical case, no public notice or opportunity to comment is provided before tariff classification rulings are rendered, nor is the importer entitled to a hearing beyond the request for a ruling and the responsive letter, which may or may not include a statement of reasons. Tariff classification rulings are extremely numerous; forty-six different Customs Service offices issue over ten thousand classifications every year.³³

Mead is designed to serve as a major statement about the nature and scope of the *Chevron* doctrine, and in many respects the opinion succeeds in providing valuable clarification. At the most general level, *Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent. Throughout the opinion, the Court refers to congressional intent, expectations, contemplations, thoughts, and objectives.³⁴ The opinion makes clear the ultimate question in every case is whether Congress intended the agency, as opposed to the courts, to exercise primary interpretational authority. This should put to end the speculation that *Chevron* rests on something other than congressional intent, such as the doctrine of separation of powers or a judge-made canon of interpretation.³⁵

Mead also emphatically reaffirms that the choice is not between *Chevron* or no deference. If *Chevron* does not apply, courts nevertheless may be required to defer to agency interpretations under *Skidmore*, which applies when the agency has some special claim to expertise under the statute, but its interpretation is not legally binding. Thus, after *Mead* we have three degrees of deference to agency interpretations of statutes: *Chevron*—a rule-like doctrine that requires courts to accept reasonable agency interpretations of ambiguous statutes; *Skidmore*—a standard that requires courts to consider agency interpretations under multiple factors and defer to the interpretation if it is persuasive; and no deference—a rule that applies when independent judicial review is required, for example, where the agency action is alleged to violate the Constitution, or where statutes designed to

31. U.S. Customs Service Administrative Rulings, 19 C.F.R. § 177.9(a) (2001).

32. *Id.* § 177.9(c).

33. *See Mead*, 533 U.S. at 233.

34. *See id.* at 229 (explaining congressional expectations); *id.* at 230 n.11 (discussing congressional intent); *id.* at 231 (mentioning congressional thoughts); *id.* at 234 (noting congressional objectives); *id.* at 236 (describing congressional intent); *id.* at 238 (providing further discussion of congressional intent).

35. For a discussion of different jurisprudential arguments justifying *Chevron* deference, endorsing congressional intent as the most plausible, see Merrill & Hickman, *supra* note 19, at 863-73.

constrain agency discretion like the Administrative Procedure Act (APA) are at issue.

Finally, *Mead* reaffirms and elaborates on *Christensen*'s basic proposition that *Chevron* applies only when the agency interpretation has the "force of law." The Court held that a two part inquiry should be undertaken in determining whether *Chevron*-style deference is in order.³⁶ The court should ask, first, whether Congress has delegated to an agency general authority to make rules with the "force of law."³⁷ If the answer is in the affirmative, the court should then ask whether the agency has rendered its interpretation in the "exercise of that authority."³⁸ Thus, the key question that must be resolved at the threshold in determining whether *Chevron* applies is one of legislative intent—whether Congress intended to delegate power to the agency to take action having the force of law.

These clarifications are of considerable importance. Still, the decision leaves major uncertainties. Most notably, Justice Souter did not identify any triggering condition for determining when an agency has been given the power to act with the force of law. Instead, his opinion proceeds by discussing a number of factors suggesting that the Customs Service had *not* been delegated power to act with the force of law in issuing tariff classification rulings.³⁹ He declined to identify any of these factors as being either necessary or sufficient conditions for finding the relevant type of delegation. In other words, the Souter opinion implicitly treats "force of law" as an undefined standard that invites consideration of a number of variables of indefinite weight.⁴⁰

To make matters worse, the Souter opinion is unclear even as to exactly how many factors it regarded as being relevant. Depending on how one reads the opinion, the Court considered either three, four, or five factors.

36. See *Mead*, 533 U.S. at 226-27, 237.

37. *Id.* at 227.

38. *Id.*

39. See *id.* at 231-34.

40. In a footnote near the end of the opinion, the majority appeared to go even further, suggesting that *Chevron*'s domain can only be determined through case-by-case, analogical reasoning:

It is, of course, true that the limit of *Chevron* deference is not marked by a hard-edged rule. But *Chevron* itself is a good example showing when *Chevron* deference is warranted, while this is a good case showing when it is not. Judges in other, perhaps harder, cases will make reasoned choices between the two examples, the way courts have always done.

Id. at 237 n.18. This suggests the Court envisioned the choice between *Chevron* and *Skidmore* being determined through a process of pure casuistic reasoning. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 1012-16 (1995) (explaining and defending casuistic reasoning).

My reading is that the discussion boils down to three factors: (1) whether Congress has prescribed relatively formal procedures; (2) whether Congress has authorized the agency to adopt rules or precedents that generalize to more than a single case; and (3) whether Congress has authorized the agency to prescribe legal norms that apply uniformly throughout its jurisdiction. Nevertheless, I readily admit that the number and correct characterization of the factors invoked in the majority opinion is open to debate.⁴¹

One factor clearly deemed relevant by the majority is whether the statute "provides for a relatively formal administrative procedure"⁴² The majority opinion says "a very good indicator" of the requisite intent is "express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."⁴³ This point will undoubtedly be the source of much confusion. I do not think the Court was saying, as some commentators and lower courts suggested before *Mead*,⁴⁴ that if an agency adopts notice-and-comment or trial-type hearing procedures on its own authority, its interpretation is presumptively entitled to *Chevron* deference. Rather, the Court seemed to be saying when Congress commands the use of notice-and-comment or trial-type procedures, and the agency exercises this authority, then the resulting interpretation presumptively reflects a delegation of authority by Congress to act with the force of law.

This proposition seems correct as an empirical generalization. Congress will tend to command the use of relatively formal procedures only when the action has important consequences, and agency action that binds with the force of law has such consequences. Thus, commands to use formal procedures will tend to be positively correlated with actions having the

41. The case for four factors would be that, in addition to whether Congress has authorized rules or precedents that generalize beyond a particular case, the Court also considered whether the agency had sought to exercise such authority. See *Mead*, 533 U.S. 230-33 (breaking into two paragraphs the discussion of the nature of the congressional delegation and the Customs Service practice). I discount this because the point of the Court's consideration of agency practice in the second paragraph seems to be to confirm its construction of congressional intent. The case for five factors would be that, in addition to the preceding four, the Court also considered whether Congress has provided for de novo review of the agency action that incorporates the interpretation. See *id.* at 233-34 & n.16 (noting the Court of International Trade (CIT) engages in independent review of tariff classification rulings). I discount this because it appears to be inconsistent with *United States v. Haggard Apparel Co.*, 526 U.S. 380, 394 (1999), which held that substantive regulations of the Customs Service are entitled to *Chevron* deference notwithstanding de novo review of Customs decisions Service by the CIT.

42. *Mead*, 533 U.S. at 230.

43. *Id.* at 229.

44. See, e.g., Jim Rossi, *Respecting Deference: Conceptualizing Skidmore with the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105 (2001).

force of law. As Justice Scalia correctly observed, however, “[t]here is no necessary connection between the formality of procedure and the power of the entity administering the procedure to resolve authoritatively questions of law.”⁴⁵ For example, the APA authorizes agencies to make legislative rules in several contexts without observing notice-and-comment procedures.⁴⁶ Thus, the relationship between procedural formality and the force of law is at most empirical, not analytic.

The majority appeared to acknowledge this point, although it did so in a manner that was itself empirical rather than analytical. The majority noted that although

the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication[,] . . . the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded⁴⁷

This, of course, does not explain *why* an instruction to use formal procedures should—or should not—be regarded as relevant to whether there has been the right kind of delegation. The Court appeared to be invoking a kind of *stare decisis*—essentially saying the lack of procedural formality cannot be decisive because in past cases the Court did not treat it as decisive.⁴⁸ For whatever reason, the Court acknowledged that whether Congress has prescribed formal procedures is neither a necessary nor sufficient condition of finding the relevant delegation; it is at most a factor positively correlated with the likelihood that such a delegation has occurred.

After the convoluted discussion of formal procedures, there ensue two

45. *Mead*, 533 U.S. at 243 (Scalia, J., dissenting). Justice Scalia notes, as an example, that rules “involving grant and benefit programs . . . are exempt from the requirements of informal rulemaking.” *Id.* at 244 (Scalia, J., dissenting).

46. See 5 U.S.C. § 553(a)(2) (2000). The APA also exempts rules involving “military or foreign affairs function[s],” and section 553 authorizes agencies to issue binding legislative rules without notice-and-comment procedures where the agency finds “good cause” to forego these procedures or when the agency adopts rules of “agency organization, procedure, or practice.” *Id.* § 553(a)(1), (b)(3)(A)-(B).

47. *Mead*, 533 U.S. at 230-31. Actually, the Court cited only one such case, *Nations-Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57, 263 (1995), to support its assertion. See *Mead*, 533 U.S. at 231. Justice Scalia cited four others, all decided within six years of *Chevron*. See *id.* at 252-53 (Scalia, J., dissenting).

48. This was a feeble argument, since the question whether *Chevron* applies notwithstanding the absence of any directive to use formal procedures had merely passed in silence in the handful of cases referenced by the Court. Thus, these were not holdings about the scope of the *Chevron* doctrine that would require overruling if they could not be accommodated to the “force of law” test.

paragraphs even more obscure in their import.⁴⁹ My interpretation of these paragraphs is they boil down to a single second factor: whether Congress has authorized agency action that has a legal effect that generalizes to more than the agency and the party who requests it. In other words, a delegation to act with legal force will ordinarily authorize rules that bind all persons who come within their terms or, at the very least, orders that invoke decisional rules which are then treated as precedents in future controversies.

If this was what the Court was saying, then it is undoubtedly correct. Any interpretation eligible for judicial deference must invoke some rule of decision—some legal principle or rationale. An administrative scheme that disclaims any binding effect beyond the party to the ruling—even if it is only precedential effect—is one that generates no “law” in the relevant

49. Lest I be accused of exaggerating, here they are:

No matter which angle we choose for viewing the Customs ruling letter in this case, it fails to qualify under *Chevron*. On the face of the statute, to begin with, the terms of the congressional delegation give no indication that Congress meant to delegate authority to Customs to issue classification rulings with the force of law. We are not, of course, here making any global statement about Customs's authority, for it is true that the general rulemaking power conferred on Customs authorizes some regulations with the force of law, or “legal norms” as we put it in [*United States v. Hagar Apparel Co.*]. It is true as well that Congress had classification rulings in mind when it explicitly authorized, in a parenthetical, the issuance of “regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned.” The reference to binding classifications does not, however, bespeak the legislative type of activity that would naturally bind more than the parties to the ruling, once the goods classified are admitted into this country. And though the statute's direction to disseminate “information” necessary to “secure” uniformity seems to assume that a ruling may be precedent in later transactions, precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents, and they enjoy no *Chevron* status as a class. In any event, any precedential claim of a classification ruling is counterbalanced by the provision for independent review of Customs classifications by the CIT; the scheme for CIT review includes a provision that treats classification rulings on par with the Secretary's rulings on “valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters.” It is hard to imagine a congressional understanding more at odds with the *Chevron* regime.

It is difficult, in fact, to see in the agency practice itself any indication that Customs ever set out with a lawmaking pretense in mind when it undertook to make classifications like these. Customs does not generally engage in notice-and-comment practice when issuing them, and their treatment by the agency makes it clear that a letter's binding character as a ruling stops short of third parties; Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued, and even then only until Customs has given advance notice of intended change. Other importers are in fact warned against assuming any right of detrimental reliance.

Mead, 533 U.S. at 231-33 (citations omitted).

sense and hence cannot have the "force of law."⁵⁰

It is unclear whether the majority understood this factor, like the first, to be empirical and predictive of the required type of delegation, or whether it was suggesting some analytical connection between authority to make generalized decisional rules and the power to act with "the force of law." At one point the majority states "precedential value alone does not add up to *Chevron* entitlement; interpretive rules may sometimes function as precedents, and they enjoy no *Chevron* status as a class."⁵¹ This would seem to negate any claim that authority to articulate a rule of decision is a *sufficient* condition of power to act with the force of law. The majority did not say whether this factor is a *necessary* condition.

A third factor stressed by the Court is also somewhat cryptic, but easier to unpack. The Court observed that the Customs Service generates thousands of tariff classifications each year from different ports of entry, with no systematic effort at coordination. The Court thought it was "simply self-refuting" to suggest that Congress intended such a system to have the force of law.⁵² The thought here seems to be that a delegation to an agency to act with the force of law will usually generate *uniform* rules throughout the agency's jurisdiction. A regulatory system unconcerned with whether like cases are treated alike is an unlikely candidate for the appellation "law."

This too seems correct as an empirical generalization. Implicit in the ideal of the rule of law is the understanding that the same legal rules will be applied to similar transactions wherever the legal regimes applies. When Congress establishes a regime that is not designed to maintain legal uniformity, it is implausible to describe the rulings generated by that regime as having the force of law. Once more, however, the Court did not suggest the uniformity is either a necessary or sufficient condition of finding the relevant type of delegation. This factor, like the first (and probably the second), is implicitly treated as predictive rather than analytical.

Justice Scalia, for his part, would apply *Chevron* to any agency interpretation that is "authoritative."⁵³ By "authoritative," however, Justice Scalia did not hone in on any single variable, as would typically be the case

50. For a discussion of the role of rules in systems of precedent, see Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) and Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

51. *Mead*, 533 U.S. at 232 (citations omitted). The Court here cited to Peter Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1472-73 (1992), which makes the point that interpretive rules are often treated by agency personnel as having approximately the same force as agency precedent.

52. *Mead*, 533 U.S. at 233.

53. *Id.* at 257 (Scalia, J., dissenting).

with a rule. To the contrary, he mentioned a variety of variables that might be relevant in determining whether a particular interpretation reflects the "official position of the agency."⁵⁴ These include: (1) whether the interpretation has been endorsed at the "highest levels" in the agency as opposed to by "some underlings;" (2) whether the general counsel has defended the interpretation in court; (3) whether the interpretation has been supported by a brief filed by the Solicitor General; and (4) whether the interpretation is more than a "post hoc rationalizatio[n]" or a legal position developed by the agency in litigation.⁵⁵ Thus, "authoritative" is also a type of standard rather than a rule. Justice Scalia acknowledged at one point that "[t]he *authoritativeness* of the agency ruling may not be a bright-line standard"⁵⁶ But, he quickly added, "it is infinitely brighter than the line the Court asks us to draw today."⁵⁷

The majority and Justice Scalia were engaged in a version of the perennial debate over rules versus standards. But, they were largely talking past one another. Justice Scalia's sarcasm about "th' ol' totality of the circumstances test" was directed at employing *Skidmore* at the primary decisional level in cases where the more rule-like *Chevron* does not apply.⁵⁸ He devoted relatively little energy to chastising the majority for adopting a meta-standard for fixing the boundary between *Chevron* and *Skidmore*.⁵⁹ The majority opinion, in contrast, was not interested in defending standards or attacking rules at the primary level. Rather, the majority was content to

54. *Id.*

55. *Id.* at 258-59 & n.6 (Scalia, J., dissenting).

56. *Id.* at 259 n.6 (Scalia, J., dissenting).

57. *Id.*

58. *Mead*, 533 U.S. at 241 (Scalia, J., dissenting). Most of Justice Scalia's arguments about the bad consequences of "the *Mead* doctrine" were directed to the majority's countenance of continued use of *Skidmore*. Thus, he argued that *Skidmore* was "a recipe for uncertainty, unpredictability, and endless litigation;" that the majority's approach would lead to an "artificial[] . . . increase" in rulemaking by agencies in an effort to escape the uncertainties of *Skidmore* and gain *Chevron* deference; and that *Skidmore* deference would lead to "ossification" of statutory law, since agency interpretations upheld under *Skidmore*, unlike those sustained under *Chevron*, cannot be reversed by agencies at some later date. *Id.* at 246, 250 (Scalia, J., dissenting).

59. Indeed Justice Scalia appeared at times to understand the majority as advocating something akin to a meta-rule for these purposes—that *Chevron* applies when agencies utilize relatively formal procedures, but not otherwise. See *id.* at 243 (Scalia, J., dissenting). Justice Scalia described the majority's "background rule" as follows:

[W]hile there is no single touchstone for [an intent to delegate authority to act with the force of law] it can generally be found when Congress has authorized the agency to act through (what the Court says is) relatively formal procedures such as informal rulemaking and formal (and informal?) adjudication, and when the agency in fact employs such procedures.

Id.

have both a rule and a standard at this level, and was preoccupied with identifying the factors that are relevant at the meta-level in determining the line of division between the two. As to this meta-question, it is unclear that either side fully appreciated the rules versus standards debate has replicating itself once again. In any event, at this level, both the majority and the dissent ultimately opted for a standard rather than a rule.

II. THE CASE FOR A META-RULE

The voluminous literature on rules and standards suggests a number of justifications for rules.⁶⁰ At least four are relevant to the choice between meta-rules and meta-standards for determining the proper scope of the *Chevron* doctrine.⁶¹ First, rules are better than standards in confining the discretion of actors at lower levels within a hierarchy, and hence are useful in overcoming principal-agent problems within complex organizations.⁶² Second, rules are better than standards in providing a basis for security of expectation about the future behavior of the government, and thus they encourage investment and planning.⁶³ Third, rules are better than standards in communicating information; hence, they facilitate coordination among different government actors.⁶⁴ Finally, rules are often more efficient than

60. See, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-63 (1987) (arguing "rules depend[] in part on the supposition that standards are not feasible . . ."); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 135-67 (1991) (noting fairness, reliance, efficiency, stability, and co-ordination as reasons for rules); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (discussing the costs and benefits of rules versus standards); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (exploring circumstances in which rules and standards are likely to be preferable); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000) (discussing implication of behavioral psychology for choice between rules and standards); Scalia, *supra* note 5, at 1179 (noting predictability as a justification for rules); Sullivan, *supra* note 17, at 62-69 (noting fairness as formal equality, utility, liberty, and democracy as arguments favoring rules).

61. These are by no means the only or even the most important justifications for rules. They are, however, the ones that I think are most relevant in considering whether a meta-rule is appropriate for delimiting the scope of the *Chevron* doctrine.

62. See Korobkin, *supra* note 60, at 37-38; Scalia, *supra* note 5, at 1179 (noting when an appellate judge adopts a general rule, the rule constrains lower courts as well as appellate judges).

63. See SCHAUER, *supra* note 60, at 137-45 (focusing on rules and predictability as facilitating reliance on decision makers); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590-92 (1988) ("[C]ourts should let the advantages and disadvantages fall where they may . . . [to] encourage people to plan and to act carefully . . .").

64. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of*

standards, because they conserve the need to expend resources on legal advice and litigation.⁶⁵

Each of these justifications links up with a different audience affected by whether the Court selects a meta-rule or meta-standard for fixing the scope of *Chevron*: the first applies primarily to the lower courts, the second to agencies, the third to Congress, and the fourth to nongovernmental entities. I consider each in turn.⁶⁶

A. Lower Courts: Confining Discretion

The lower federal courts are obviously a primary audience for any meta-test devised by the U.S. Supreme Court for fixing the boundary between *Chevron* and *Skidmore*. Rules are generally more predictable and easier to enforce than standards. Hence, they generally are a superior mechanism for controlling the behavior of subordinate actors within a hierarchy. The issue here is how important it is that the Court be able to control the behavior of the lower courts. In the federal judicial system, the problem of control is greatly exacerbated by the extremely limited number of cases the U.S. Supreme Court can review in any given year.⁶⁷ If the Court had the capacity to review every court of appeals decision, then it could indulge in the luxury of engaging in case-by-case reasoning in defining the scope of the *Chevron* doctrine. But, when the Court has the ability to review only a small percentage of cases, effective control of the lower courts' behavior may require that the Court adopt a meta-rule.

The issue of control of lower courts is especially important where part of

Property: the Numerus Clausus Principle, 110 YALE L.J. 1 (2000) (commenting on the communicative function of rules in the context of standardized units of ownership in property law).

65. See SCHAUER, *supra* note 60, at 145-49 ("[W]hen a decision-maker decides according to rules and therefore relies on decisions made by others, she is partially freed from the responsibility of scrutinizing every substantively relevant feature of the event.").

66. I will not consider one possible objection to this inquiry: that the legal rubric for deference has little effect on judicial behavior, so there is no point in quibbling about it. Whether *Chevron*'s two step approach results in more acceptance of agency interpretations than *Skidmore*'s multi-factoral standard is, of course, an empirical question. Although more and better studies are needed in order to resolve this question, there is reason to believe that, at least at the margins, use of the *Chevron* formula will produce greater deference by courts to agency interpretations of law than would an open-ended standard like *Skidmore*. This is particularly likely to be true in the lower courts. See generally Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Court of Appeals*, 15 YALE J. ON REG. 1 (1998) (reviewing studies of the impact of *Chevron*).

67. See Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1118-29 (1987).

the objective is to assure that lower courts follow a rule-like approach, i.e., *Chevron*, over a significant range of controversies. Although *Christensen* and *Mead* cut back on the scope of the *Chevron* doctrine, there is no sign that the Court is less committed to *Chevron* where it properly applies. If anything, the Court's commitment appears to be growing as it comes to see *Chevron* deference as the only plausible strategy for preserving uniformity and coherence within complex federal statutory regimes.⁶⁸ Yet, if we adopt a meta-standard to govern the choice between rules and standards at the primary decisional level, there is obviously a danger that lower courts will employ this meta-standard to favor the use of the discretion-maximizing primary standard (*Skidmore*).⁶⁹

I do not wish to overstate the danger of lower court discretion here. If lower courts look beyond the Court's nebulous meta-standard, and heed the holdings of its recent decisions, their discretion clearly will be constrained to a significant degree. After *Mead*, no lower court will apply *Chevron* rather than *Skidmore* to an agency interpretation adopted in an opinion letter. And no lower court is likely to apply *Skidmore* rather than *Chevron* to an agency interpretation adopted pursuant to an express grant of legislative rulemaking authority. The area of uncertainty has been narrowed to things like interpretative regulations adopted after notice-and-comment procedures, and informal adjudications that are treated like precedents by the agency. Moreover, the problem of lower court discretion in these intermediate areas is likely to be only temporary. As the Court gradually decides cases in these intermediate areas, it should eventually transform the meta-standard into something more like a complex meta-rule, thereby reducing lower court discretion.

Still, if it is generally desirable that lower courts give *Chevron* deference to agency interpretations, such a goal will be undermined to a degree if lower courts are given broad discretion under a meta-standard to decide whether *Chevron* applies over a range of situations not yet addressed by the U.S. Supreme Court. The risk that lower courts will undermine the systemic benefits of greater deference to agency interpretations; thus, provides some basis for preferring a meta-rule over a meta-standard.

68. See Merrill & Hickman, *supra* note 19, at 861-62.

69. An analogy is the contrast in choice of law between Joseph Beale's vested rights doctrine (a meta-rule) and Brainerd Currie's interests analysis (a meta-standard). See Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1558-60 & nn.33, 34 & 44 (2000). One consequence of adopting a meta-standard for choice of law purposes is that it effectively gives trial courts discretion to determine which substantive law to apply.

B. Agencies: Encouraging Investment

Agencies are also affected by the choice between meta-rule and meta-standard. Here, the relevant justification for using rules rather than standards is they make the behavior of those who wield the coercive power of the state more predictable, and in doing so, facilitate planning and encourage investment. This justification applies to agencies in the following way. Agencies regard *Chevron* deference as a good thing. Agencies very much want judges—government actors who review their decisions and have the authority to set them aside—to accept their legal interpretations, so they can more effectively implement the statutes they have been charged with administering. Yet, it is now clear, agencies must make a certain investment in administrative processes to obtain the *Chevron* payoff. In the vocabulary of *Christensen* and *Mead*, agencies must take whatever procedural steps are necessary to assure that their interpretation has the “force of law.” It is a matter of considerable importance to agencies that they know in advance that if they make this investment they will get the *Chevron* payoff. Otherwise, they may end up foregoing opportunities to obtain *Chevron* deference because they erroneously assume it is unavoidable, or they may end up expending resources on procedures unnecessarily because they erroneously assume *Chevron* is avoidable.

To make the problem more concrete, consider two examples. Agencies often face the choice between making policy by legislative or interpretative rule. Legislative rules entail certain costs that interpretative rules do not: Legislative rules usually require the agency to engage in cumbersome notice-and-comment procedures, and once adopted, a legislative rule cannot be retroactively amended.⁷⁰ If both legislative and interpretative rules were entitled to *Chevron* deference, many agencies would prefer to use interpretative rules to make policy. But, if only legislative rules get *Chevron* deference, then there is a tradeoff. The agency will have to decide whether obtaining the higher degree of judicial deference is worth the additional procedural costs associated with legislative rules.

One can tell a similar story about the choice between formal adjudication and opinion letters. Formal adjudication requires a greater investment in procedures than opinion letters do, and formal adjudication typically creates a precedent that can be cited in future cases, whereas opinion letters often do not. So, if agencies can get *Chevron* deference for opinion letters,

70. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-25 (1988) (Scalia, J., concurring) (noting absent express statutory authority to the contrary, the APA prohibits legislative rules with retroactive effect); *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (“Certainly regulations subject to the APA cannot be afforded the ‘force and effect law’ if not promulgated pursuant to the statutory procedural minimum found in that Act.”).

many agencies would prefer to go this route. If only formal adjudication gets *Chevron* deference, however, it is a more difficult call because the price of such deference is higher.

Adopting a meta-rule to determine the scope of the *Chevron* doctrine would reduce uncertainty about what sorts of agency interpretations are eligible for *Chevron* deference. Agencies would thus find it easier to predict what sort of payoff they will receive for using different types of procedural formats to advance interpretations of law. Greater predictability about payoffs should reduce the incidence of over-or under-investment in administrative procedures, and should reduce the number of episodes in which agency initiatives are frustrated by what happens on judicial review. All of this seems desirable, and provides a second reason to prefer a meta-rule to a meta-standard for defining the ambit of *Chevron*.

C. Congress: Communicating Information About Legal Options

A third audience affected by the Court's choice between a meta-rule and a meta-standard is Congress. Here, we encounter yet another advantage of rules relative to standards—because they are relatively predictable, rules send clearer signals than standards about what legal options exist. Better communication about legal options not only enhances individual reliance interests, it also facilitates coordination among governmental institutions.⁷¹ This is relevant to Congress because *Christensen* and *Mead* make it clear that Congress has the authority to turn *Chevron* deference on and off. Congress can either delegate power to an agency to act with the force of law with respect to a particular issue (*Chevron* on), or it can choose not to delegate such power to the agency (*Chevron* off). But, Congress can exercise this authority only if it knows what it must say in a statute in order to convey the message that an agency has been given power to act with the force of law.⁷² If acting with the force of law is defined by a meta-rule, then Congress will have a relatively clear signal about what it must do to confer primary interpretative authority on an agency. Conversely, if acting

71. See William N. Eskridge, Jr. & Philip P. Frickey, *Foreward: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994).

72. See *Finley v. United States*, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretative rules, so that it may know the effect of the language it adopts."). For recognition of this point in the context of *Chevron*, see Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can it be Done in the Post-Chevron Era?*, 13 J.L. & POL. 105 (1997); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 5 (2000); Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 516-17.

with the force of law is defined by a blurry meta-standard, whether Congress has succeeded in designating an agency (or the courts) as the primary interpreter often cannot be established until after the issue has been litigated. Adopting a meta-rule, therefore, serves to preserve and protect the role of Congress, which the Court has identified as the very foundation of the *Chevron* doctrine.

In this regard, it is important to note that *Christensen* and *Mead* represent a significant step toward revitalizing the principle of legislative supremacy, or if you will, the nondelegation doctrine. By grounding *Chevron* in congressional intent to delegate power to make rules with the force of law, the Court has resuscitated the axiom that Congress is the primary source of authority to make law within our system of separation of powers. With narrow exceptions, neither the executive nor the courts have inherent power to act with the force of law.⁷³ They derive such power only pursuant to a valid delegation from Congress.⁷⁴ If this principle is worth reaffirming, then presumably it is important that Congress, and all other actors within the system of separation of powers, understand what it takes for Congress to delegate the power to make rules with the force of law.⁷⁵

A possible objection to these arguments is that, at least as to the future, Congress should have no trouble directing whether agencies have authority to make interpretations that have the force of law. Congress simply has to include a statement in the statute that agency rules or orders will or will not have the force of law. (For that matter, Congress could simply specify whether reviewing courts should or should not apply "the *Chevron* doctrine").

This is true as to new legislation, but it overlooks the problem of what happens under existing legislation. Congress does not have the time or institutional capacity to review and amend all existing delegations to agencies to add the appropriate tag line to assure the desired allocation of interpretational authority is reached. If the Court adopts a clear meta-rule about what kinds of delegations will sustain *Chevron* deference, however, then

73. See JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 110-19 (1925) (discussing the lack of inherent executive power to make law); Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 339 (1992) (discussing the lack of inherent judicial power to make law).

74. For a clear statement of this principle, which has never been overruled, see *ICC v. Cincinnati, New Orleans & Texas Pacific Railway Co.*, 167 U.S. 479, 494-95 (1897) (holding Interstate Commerce Commission (ICC) cannot be given substantive rulemaking authority by implication, but only by express grant).

75. The linkage between *Mead* and the nondelegation doctrine has already been perceived by the D.C. Circuit. See *Michigan v. EPA*, 254 F.3d 1087 (D.C. Cir. 2001) (relying upon *Mead* in striking down Environmental Protection Agency (EPA) rule as being unsupported by any delegation of authority to make rules with the force of law).

Congress (and affected agencies and interest groups) usually can ascertain by examining existing statutes what conclusion courts will reach. In this way, the relevant parties will be in a position to know which statutes can be left alone, and which should be targeted for revision.

D. Nongovernmental Entities: Efficiency

Finally, nongovernmental entities subject to the regulatory oversight have an interest in whether the scope of the *Chevron* doctrine is defined by a meta-rule or a meta-standard. Because rules are more predictable than standards, lawyers generally can provide better advice about the probable outcome under a rule than they can about the probable outcome under a standard.⁷⁶ Similarly, when issues are drawn into litigation, arguments about the proper application of a rule will generally require less effort to develop than arguments about the proper application of a standard. Where meta-issues are concerned, these disparities in the relative efficiency of rules and standards are multiplied.

Consider a regulated entity that seeks advice from a law firm about whether an agency interpretation of law is likely to be sustained on judicial review. If it is unclear whether the reviewing court will apply *Chevron* or *Skidmore*, and the choice between the two is governed by a meta-standard, the advice will have to cover three issues: (a) the probable outcome under *Chevron*, (b) the probable outcome under *Skidmore*, and (c) whether it is more likely that the interpretation will be reviewed under *Chevron* or *Skidmore*. In contrast, if the dividing line between *Chevron* and *Skidmore* is marked by a rule, the legal advice very likely will have to address only point (a) or point (b). In effect, the use of a meta-rule reduces the issues that must be considered to one-third what would be required under a meta-standard.

Similarly, consider a regulated entity that seeks to challenge an administrative interpretation on judicial review. If it is unclear whether the court will apply *Chevron* or *Skidmore*, then each of the three issues mentioned above—(a), (b), and (c)—must be briefed by the parties. If the choice is governed by a rule, chances are the briefs will have to cover only (a) or (b). Thus, determining when *Chevron* applies by use of a meta-rule would almost certainly result in efficiency gains, specifically in terms of conserving on the resources expended by nongovernmental entities on legal advice and litigation.

76. See SCHAUER, *supra* note 60, at 145-49 (discussing the "efficiency" of rules); *cf.* Korobkin, *supra* note 60, at 34-35 (arguing that advice costs and costs of predicting what behaviors are permitted are generally higher under standards than rules).

* * * *

In sum, there is a substantial case, at least in the abstract, for determining the scope of the *Chevron* doctrine by means of a meta-rule rather than a meta-standard. The rule-based approach promises to constrain the discretion of the lower courts, encourages agencies to make the correct investments in administrative procedures when formulating policy, provides a clear signal that Congress can use to allocate interpretational power between agencies and courts, and conserves on expenditures on legal advice and litigation by regulated entities. This conclusion is consistent with the meta-tests found in other areas of administrative law, where questions about applicable procedures or standards of review are often resolved by using relatively bright-line, single-variable rules. Examples include the question whether formal or informal procedures apply in rulemaking, and whether adjudications are subject to the substantial evidence standard of review, both of which are resolved by asking whether Congress has specified that the agency action is to be "on the record."⁷⁷

The main vice of rules, as emphasized in the literature on rules and standards, is that they are almost always either over- or under-inclusive with respect to the underlying goals of the legal system.⁷⁸ In other words, rules will always generate sub-optimal results relative to an ideal system that would *costlessly* apply a standard that reflects those goals. But, of course, standards are not costless. As emphasized here, standards generate principal-agent problems, uncertainty costs, communications difficulties, and increased expenses devoted to legal services. The question then becomes whether there is any meta-rule that will delineate *Chevron's* domain in a way that achieves the cost savings associated with rules, but without generating excessive problems of over- or under-inclusion.

III. WHEN AGENCIES ACT WITH THE FORCE OF LAW

In determining whether there is a satisfactory meta-rule for determining the scope of the *Chevron* doctrine, I take it as a given that the basic inquiry is whether Congress has delegated power to an agency to make rules with the force of law, as *Christensen* and *Mead* so hold. Kristin Hickman and I have spelled out more fully elsewhere why this foundational proposition is consistent with the underlying rationale of the *Chevron* doctrine.⁷⁹ We can,

77. *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 241 (1973) (formal rule-making procedures required only when statute requires hearing "on the record"); *Camp v. Pitts*, 411 U.S. 138, 141 (1973) (substantial evidence review applies only when reviewing findings made on a hearing record).

78. See KELMAN, *supra* note 60, at 40-41; SCHAUER, *supra* note 60, at 31-34; Korobkin, *supra* note 60, at 36-37; Sullivan, *supra* note 17, at 58.

79. See Merrill & Hickman, *supra* note 19, at 863-82.

therefore, narrow our search by asking whether it is possible to articulate a satisfactory rule for identifying when Congress has delegated power to act with the force of law.

A. The Key Variable: Legislated Consequences for Violations of Agency Action

Traditional administrative law readily suggests a candidate for such a rule—an agency acts with the force of law when it adopts a rule or order that, once final, is no longer open to challenge and subjects a person who violates the rule or order to the imposition of some sanction, disability, or other adverse consequence. Administrative-law types will recognize that this is a restatement of the familiar “legal effects” test for identifying legislative or substantive rules. As stated in the leading decision of the D.C. Circuit:

A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.⁸⁰

A parallel understanding exists with respect to adjudications. Agency orders adopted in adjudications are understood to have the force of law when, once they are final, the order is regarded as *res judicata* and is no longer open to challenge on the merits.⁸¹ In a subsequent action to enforce such an order, the only issues are whether the order was violated and if so, what sanction for violation is appropriate.

These traditional understandings can be adopted as the basis for a meta-rule defining what it means for an agency to act with the force of law—with one important qualification. The inquiry that is typically undertaken today in asking whether an agency rule or order has the force of law focuses on whether *the agency intended* its action to give rise to sanctions, disabilities, or other adverse legal consequences once it becomes final.⁸² In effect, courts have assumed agencies have the power to act with the force of law, and have asked whether the agency, in its discretion, has exercised this

80. *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

81. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987) (decision of ICC not to reopen prior order not subject to judicial review once time for appeal of underlying order has passed); *Califano v. Sanders*, 430 U.S. 99, 111 (1977) (no judicial review of decision declining to reopen benefits determination after time for appeal of initial decision lapsed).

82. *See, e.g., Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (“[I]f by its action the agency intends to create new law, . . . the rule is properly considered to be a legislative rule.”).

power.⁸³ In the context of determining the scope of the *Chevron* doctrine, the threshold inquiry, following *Mead*, must be whether *Congress has delegated power* to the agency to act with the force of law. In other words, before asking whether the agency intended to act with the force of law, we must first determine whether, under the agency's organic legislation, Congress has given the agency power to make rules or orders that have the force of law. *The critical inquiry for these purposes is whether Congress has provided by statute that persons who violate an agency's rules or orders will be subject to the imposition of sanctions, disabilities, or other adverse consequences.* In other words, the key variable under the proposed meta-rule is whether Congress has included a provision in the statute that prescribes sanctions or other legal consequences for violations of agency action.

To illustrate, consider the contrast between the rulemaking grants in the Securities Act of 1933 and the National Labor Relations Act (NLRA) of 1935. The Securities Act provides in section 19(a) that "[t]he Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter"⁸⁴ This is clearly a grant of authority to make rules having the force of law, because section 24 of the Act specifically provides that "[a]ny person who willfully violates any of the provisions of this subchapter, or the rules and regulations promulgated by the Commission under authority thereof, . . . shall upon conviction be fined not more than \$10,000 or imprisoned not more than five years, or both."⁸⁵ Section 6(a) of the NLRA provides, in terms very similar to section 19(a) of the Securities Act, that "[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of title 5, such rules and regulations as may be necessary to carry out the provisions of this subchapter."⁸⁶ This is not a grant of authority to make rules having the force of law because the NLRA contains no provision imposing any sanction, disability, or other adverse legal consequence on persons who violate such regulations.⁸⁷

83. *But see* Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 707 F.2d 548, 558 (D.C. Cir. 1983) ("A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue.").

84. 15 U.S.C. § 77s(a) (2000).

85. *Id.* § 77x (emphasis added).

86. 29 U.S.C. § 156 (1994).

87. The phrase "in the manner prescribed by subchapter II of chapter 5 of title 5," *i.e.*, the Administrative Procedure Act (APA), was added by amendment by the Taft-Hartley Act in 1947. If, as I maintain, the Labor Board was not given any authority to promulgate rules with the force of law, this amendment is puzzling, since the APA generally prescribes pro-

Focusing on the presence or absence of congressionally-prescribed legal consequences is more than just a convenient formalism. It also makes sense as a guide to congressional intent, provided one adopts two fairly plausible assumptions. One assumption is that most members of Congress understand that agencies act with the force of law when they adopt rules or orders backed by sanctions, broadly understood to mean civil or criminal penalties, disabilities or other legal consequences. That is to say, most members of Congress, at least when drafting regulatory statutes, embrace an Austinian or positivist conception of "law" as rules backed by the coercive power of the state.⁸⁸ The other assumption is that most members of Congress believe agencies can act with the force of law only if Congress gives them this power, either expressly or by clear implication. In other words, members of Congress embrace the version of the nondelegation doctrine that denies agencies have any inherent power to make law. Put these assumptions together, and it follows that most members of Congress understand agencies have been given authority to make rules or orders with the force of law only if Congress has prescribed some sanction or other legal consequence for the violation of the agency's rules or orders.

Historically speaking, there is also surprising support for the proposition that the presence of legislated sanctions for violations of agency rules has been regarded by Congress as the key variable in determining whether statutes authorize agencies to act with the force of law. The legislative histories of a number of important regulatory statutes of the Progressive and New Deal eras indicate Congress regarded the inclusion of sanctions for violations of agency rules as the critical point of differentiation between grants of substantive and mere interpretative power.⁸⁹ Commentaries by attorneys who were actively involved in advising Congress on this issue,

cedures only for legislative rules. The *Mead* approach, which puts great weight on whether Congress has directed the use of notice-and-comment procedures for rulemaking, requires that we try to decipher the significance of this amendment in determining whether Congress has delegated authority to the Labor Board to make rules with the force of law. My approach, which would look only to whether Congress has attached consequences to the violation of rules, renders the mysterious amendment irrelevant.

88. J.L. Austin defined law to mean general commands backed by the threat of sanctions. See generally JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfred Rumble ed., 1995). Austin's command theory was a central tenet of Landellian legal formalism of the late 19th and early 20th centuries. See ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 83-104 (1998). Although the Legal Realists attacked the Landellian conception, they did so largely because they objected to what they regarded as the deductive nature of formalism, not because they disagreed with the command theory. See *id.*

89. The evidence is detailed in Thomas W. Merrill & Kathryn A. Tongue, *Agency Rules with the Force of Law: The Original Convention* (Oct. 22, 2001) (unpublished manuscript, on file with author, forthcoming 116 HARV. L. REV.).

and materials assembled by the Attorney General's Committee on Administrative Procedure, also confirm this understanding.⁹⁰ Whether Congress continues to adhere to this understanding is harder to say, since modern courts have not focused on the presence of legislated sanctions in determining whether agencies have substantive rulemaking power.⁹¹ But, at least during the formative years of the administrative state this was the congressional practice, and that practice forms part of the backdrop of understanding reflected in the APA.

B. Over- and Under-inclusion

Like all rules, the proposed meta-rule keyed to whether Congress has prescribed sanctions or other legal consequences for violations of agency action is both over- and under-inclusive, in the sense that it would identify power to act with the force of law in certain circumstances where it may be objectionable, and would deny such power in certain circumstances where it may be desirable. The question, as always, is whether the costs of over- and under-inclusion are sufficiently great to cause us to abandon the use of rules (or at least, of *this* rule), in favor of a standard.

The principal problem of over-inclusion is that the proposed meta-rule includes within its sweep certain kinds of agency action as to which the public has no notice or opportunity to comment before an interpretation is adopted. Before turning to these instances, it is important to stress that, on the whole, the proposed meta-rule does a pretty good job of limiting *Chevron* deference to situations in which some kind of public notice and input is in fact available. The rule excludes from the realm of *Chevron* deference all interpretative rules and policy statements—the most important exemptions from notice-and-comment requirements under section 553 of the APA.⁹² Neither interpretative rules nor policy statements give rise to sanctions or other adverse legal consequences immediately upon violation; the agency must bring some independent action to achieve this result, in which the norm reflected in the interpretative rule or policy statement will be open

90. See Frederick P. Lee, *Legislative and Interpretative Regulations*, 29 GEO. L.J. 1 (1940) (article by former House and Senate legal counsel); see also FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 27 (1941).

91. See Nat'l Ass'n of Pharm. Mfrs. v. FDA, 637 F.2d 877 (2d Cir. 1981) (holding Food and Drug Administration (FDA) has general substantive rulemaking authority notwithstanding absence of any provision imposing sanctions or other legal effects for violations of rules promulgated under general rulemaking authority); Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973) (holding Federal Trade Commission (FTC) has substantive rulemaking power even though original grant of rulemaking power contained no mention of sanctions or other legal consequences of violating rules).

92. See 5 U.S.C. § 553(b)(A) (2000).

to challenge.⁹³ In addition, the proposed rule eliminates from the scope of *Chevron* opinion letters, agency manuals, press releases, amicus briefs, and so forth—all of which lack any legislative sanction for violation and also lack any requirement of public input before promulgation.

Still, there are a few instances of agency action that have the force of law under the proposed meta-rule but are exempt from any public notice-and-comment requirement. These include legislative rules for which good cause exists to omit these requirements, certain types of rules associated with benefit and grant programs, and procedural rules.⁹⁴ For one who believes (as I do) that *Chevron* deference should generally be confined to circumstances in which there has been some opportunity for public input before an interpretation is adopted, these exceptions are troubling. On the other hand, it should be noted by way of mitigation that legislative rules adopted under the good cause exception are usually only interim rules. Procedural rules will generally be of lesser consequence than legislative rules. And modern benefit and grant statutes often are implemented by notice-and-comment rulemaking even if not required by the APA.⁹⁵

There are two problems of under-inclusion. One is that the legislative-sanctions test which would deprive certain agencies of *Chevron* deference for interpretations contained in rules, because, under this definition, they would have no authority to promulgate legislative rules. Included most prominently here are the National Labor Relations Board (NLRB) and the Food and Drug Administration (FDA) (as to rules promulgated under its general rulemaking authority). Both agencies have grants of rulemaking authority that include no provision for sanctions or other adverse consequences for rule violations.⁹⁶ This is a genuine problem, however, only if one is prepared to reject as irrelevant the intentions of the Congresses that adopted the organic legislation establishing these agencies. It is quite clear that the Congresses that enacted the NLRA in 1935⁹⁷ and the Federal Food, Drug, and Cosmetic Act of 1938⁹⁸ did not intend to give either agency gen-

93. See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 228-48 (3d ed. 1994).

94. See 5 U.S.C. § 553(a)(2); *United States v. Mead Corp.*, 533 U.S. 218, 244 (2001) (Scalia, J., dissenting).

95. On the interim status of rules adopted under the good cause exception and the limited consequences of procedural rule exception, see Merrill & Hickman, *supra* note 19, at 905-07. For an example of benefit and grant rules made subject to APA procedures, see *Batterton v. Marshall*, 648 F.2d 694, 700 (D.C. Cir. 1980) (noting general policy of the Labor Department to waive any invocation of APA exemption for benefit and grant rules).

96. For details, see Merrill & Tongue, *supra* note 89.

97. 29 U.S.C. §§ 151-187 (1994 & Supp. V 1999).

98. 21 U.S.C. §§ 301-395 (1994 & Supp. V 1999).

eral legislative rulemaking authority.⁹⁹ If this state of affairs is deemed to be inconsistent with contemporary views of appropriate agency authority, then Congress can amend the statutes to give these agencies legislative rulemaking authority, as it did in the case of the similarly-situated Federal Trade Commission, which also lacked legislative rulemaking authority until it was conferred by Congress in 1975.¹⁰⁰

The other problem is that certain agencies that engage in relatively formal adjudication would be denied *Chevron* deference for interpretations rendered in adjudications, because their orders are not self-executing. The NLRB, for example, issues cease and desist orders that do not result in any imposition of sanctions for violations, unless and until a court enters an order enforcing the Board's order.¹⁰¹ Thus, it is the court's order, not the Board's, that gives rise to the imposition of sanctions for violations. Since the proposed meta-rule focuses on whether Congress has prescribed some sanction for violation of the agency's rule or order, this means NLRB orders would not be entitled to *Chevron* deference. This result seems somewhat counterintuitive, since NLRB orders are issued after a relatively formal adjudicatory process, and the Court has often stressed that the NLRB's interpretations adopted in adjudication are entitled to deference (although it has not expressly held that they are entitled to *Chevron* deference).¹⁰² On the other hand, the fact that Congress declined to give NLRB orders the force of law unless they have been reviewed and sustained by a court tells us something about whether Congress intended to give the Board primary interpretational authority.

Whether these instances of over- and under-inclusion are sufficiently troubling to warrant the use of a standard rather than a rule, or to warrant abandonment of the proposed meta-rule in favor of some other (possibly more complex) rule, is necessarily a judgment call. My own view is that the advantages of a clear and simple rule are sufficiently great, and the known instances of over- and under-inclusion are sufficiently few, that the proposed rule warrants our allegiance. In other words, I see no reason why the Court could not have offered a single-variable triggering definition for what it means for an agency to act with the force of law, consistent with

99. See Merrill & Tongue, *supra* note 89.

100. See Federal Trade Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (amending the Federal Trade Commission Act of 1914 to confer legislative rulemaking authority on the FTC). The D.C. Circuit held in 1974 that the FTC has legislative rulemaking authority, but this was contrary to the original understanding of the FTC Act of 1914 and to longstanding practice. See *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

101. See 2 PATRICK HARDIN ET AL., *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1877-78* (3d ed. 1992).

102. See Merrill & Hickman, *supra* note 19, at 838 n.23.

traditional administrative law precepts: Agencies have been given power to act with the force of law when Congress has prescribed some sanction or other legal consequence for violations of agency action. In so doing, it could have avoided the "utter flabbiness"¹⁰³ of its list-of-factors approach.

CONCLUSION

On the whole, "the *Mead* doctrine" is a sound development. *Mead* clarifies that *Chevron* rests on congressional intent, and correctly concludes from this that *Chevron* applies only when Congress has given some signal that the agency, rather than the court, is to be the primary interpreter of statutory ambiguity. The decision also correctly concludes that the relevant signal of Congress's intent in this regard is a delegation of power to act with the force of law. By linking *Chevron* and congressional intent, *Mead* helps achieve a reconciliation between *Chevron* and the judicial review provisions of the APA.¹⁰⁴ Indeed, by insisting that the agency gets strong deference only when it acts within the scope of delegated power to act with the force of law, and not otherwise, *Mead* goes part way toward restoring an important aspect of the nondelegation doctrine, which otherwise fared poorly last Term.¹⁰⁵

To be sure, the decision comes up short in terms of articulating a meta-rule to guide lower court in future controversies. *Mead* says *Chevron* applies only when Congress has delegated authority to an agency to act with the force of law, but it treats "force of law" as (at most) a standard to be applied by looking to a variety of factors. The Court's decision to treat "force of law" as a standard rather than a rule is regrettable. But nothing the Court did or said precludes future decisions that brush away the fuzziness in the majority's exposition, leaving us with a clear and defensible

103. *Mead*, 533 U.S. at 245 (Scalia, J., dissenting).

104. The APA provides that reviewing courts are to "decide all relevant questions of law." 5 U.S.C. § 706 (2000). This directive arguably can be reconciled with *Chevron* deference to agency interpretations, however, if Congress, by delegating power to an agency to take action with the force of law, is understood implicitly to direct courts to accept reasonable agency interpretations. Justice Scalia argues in his *Mead* dissent that this "implied repeal" theory is inconsistent with section 559 of the APA, which says that a subsequent statute may be held to supersede the APA only if it does so "expressly." *Mead*, 533 U.S. at 241 n.2 (Scalia, J., dissenting); see 5 U.S.C. § 559. But surely identifying a duty to defer to the agency based on the *express* presence of legislated consequences for rule violations comes closer to superseding the APA "expressly" than does Justice Scalia's theory, which rests the duty to defer on a generalized "legal presumption of congressional intent" untethered to any specific legislative directive. *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

105. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (rejecting once again a claim that Congress had unconstitutionally delegated power to an agency by failing adequately to limit agency discretion).

meta-rule.

Finally, notwithstanding Justice Scalia's fulminations, *Mead* secures a bright future for the *Chevron* doctrine. It is now clear that *Chevron* deference is significantly more powerful than ordinary deference. It is also clear that *Chevron* applies whenever agencies exercise delegated lawmaking authority from Congress. With these propositions established, judges are more likely to take *Chevron* seriously. This includes the Justices of the Supreme Court. In the past, a number of Justices have ignored *Chevron* or applied a watered down version of *Chevron*.¹⁰⁶ In *Mead*, eight Justices trimmed back on the scope of *Chevron*, but gave it a sounder jurisprudential foundation and signaled that it enjoys the full support of the Court in its new, slimmed-down form. In the long run this compact, but powerful, *Chevron* doctrine should enhance, rather than retard, the transfer of interpretational power from courts to agencies.

106. See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 980-93 (1992).